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In The
Supreme Court of the United States

Springfield Terminal Railway Company and
Aroostook and Bangor Resources, Inc.,
Petitioners,

v.

Brotherhood of Locomotive Engineers and
United Transportation Union,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a federal common law veil-piercing standard be applied in Federal Railway Labor Act status quo injunction cases?

2. If so, what should the content of such federal common law veil-piercing standard be?

PARTIES TO THE PROCEEDING

Petitioners

Springfield Terminal Railway Company and Aroostook and Bangor Resources, Inc. Springfield Terminal Railway Company has a parent corporation, Guilford Transportation Industries, which is not publicly traded. Aroostook and Bangor Resources, Inc. has no parent corporation.

Respondents

Brotherhood of Locomotive Engineers and United Transportation Union.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT FOR GRANTING WRIT 9

ARGUMENT 1
The First Circuit's decision to apply a federal common law veil-piercing standard is in direct conflict with this Court's decision in *O'Melveny & Myers v. Federal Deposit Insurance Corporation* 10

ARGUMENT 2
The question what veil-piercing standard should apply to federal Railway Labor Act status quo injunction cases is of such national importance that it should be settled by this Court 14

CONCLUSION 16

APPENDIX

Appendix A
First Circuit Court of Appeals Opinion, 4/5/00 . . . . . 1a

Appendix B
District Court Permanent Injunction, 3/2/99 . . 49a

Appendix C
District Court Judgment and Order, 3/5/99 . . . 52a

Appendix D
First Circuit Court of Appeals Order Denying Rehearing, 7/10/00 . . . . . 64a

Appendix E
45 U.S.C. §§ 151, 152, 153 and 156 . . . . . 65a

TABLE OF AUTHORITIES

Cases

Burks v. Lasker,
441 U.S. 471 (1979) 12

Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299 (1989) 4

Detroit & Toledo Shoreline R.R. v. United Transp. Union, 396 U.S. 142 (1969) 3, 4

Elgin, Joliet & E. Ry. v. Burley,
325 U.S. 711 (1945) 3, 4

In Re Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp. 22
(Mass. 1987) 14

Johnson v. Exclusive Properties Unlimited,
720 A.2d 568 (Me. 1998) 13, 14

National Soffet & Escutcheons, Inc. v. Superior Sys., Inc.,
98 F.3d 262 (7th Cir. 1996) 15

O'Melveny & Myers v. Federal Deposit Insurance Corporation,
512 U.S. 79 (1994) 10, 13, 16

Publicker Indus., Inc. v. Roman Ceramics Corp.,
603 F.2d 1065 (3rd Cir. 1979) 15

Theberge v. Darbro, Inc.,
684 A.2d 1298 (Me. 1996) 13

United States v. Bestfoods,
524 U.S. 51 (1998) 12, 13, 14, 15

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 8

28 U.S.C. § 1337 8

28 U.S.C. § 1651 8

28 U.S.C. § 2106 1

28 U.S.C. § 2201 8

45 U.S.C. § 151 . . . . . 3, 5

45 U.S.C. § 152 4

45 U S.C. § 153 4

45 U.S.C. § 156 . . . . . 4, 5

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 210 F.3d 18 (1st Cir. 2000). A copy of the Opinion is included in the Appendix at Appendix A at 1a. The Opinion of the District Court for the District of Maine is published at 1999 U.S. Dist. LEXIS 21717 (D. Me. 1999) and is included in Appendix C at 52a.

JURISDICTION

The United States Court of Appeals for the First Circuit issued its Opinion on April 5, 2000. On April 18, 2000, Petitioners filed a Petition for Rehearing *En Banc* which the United States Court of Appeals denied on July 10, 2000, (App. D at 63a).[1] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

45 USCS § 151

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45 USCS § 152

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[1] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

Seventh. Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreement or in section 6 of this Act [45 USCS § 156].

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45 USCS § 153

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45 USCS § 156

Procedure in changing rates of pay, rules, or working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act [45 USCS § 155], by the Mediation Board, unless a period of ten days has elapsed after

termination of conferences without request for or proffer of the services of the Mediation Board.
(May 20, 1926, ch 347, Title I, § 6, 44 Stat. 582; June 21, 1934, ch 691, § 6, 48 Stat. 1197; April 10, 1936, ch 166, 49 Stat. 1189.)

STATEMENT OF THE CASE

The Federal Railway Labor Act (RLA), found at 45 U.S.C. § 151 *et seq.*, is "designed to channel labor disputes into constructive resolution proceedings as a means of avoiding interruptions to commerce among the states." *Detroit & Toledo Shoreline RR. v. United Transp. Union*, 396 U.S. 142, 148-49 n. 13 (1969). Under the RLA, a federal district court has no jurisdiction to rule on the merits of a labor dispute. Rather, the court may only decide what type of statutorily mandated dispute resolution procedure is appropriate, depending upon the category of the dispute. *See Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 722-23 (1945). Thus, in order to maintain equal bargaining ability while preserving uninterrupted commercial and rail activity, two distinct avenues for dispute resolution are provided by the RLA. A *major dispute*

> relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

Elgin, 325 U.S. at 723. By contrast, a *minor dispute*

> contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case . . . . In either case the claim is to rights accrued, not merely to have new ones created for the future.

Id.

The consequences flowing from the major-minor dispute categorization are profound. If the dispute is minor, the district court dismisses the case in favor of binding arbitration before the National Railroad Adjustment Board. App. E. (45 U.S.C. § 153) at 70a-71a. By contrast, if the dispute is major, the RLA provides for extensive, non-binding mediation procedures. In major disputes, the RLA bars the carrier from persisting in the challenged conduct until the mediation process has been exhausted. *Detroit & Toledo Shoreline RR.*, 396 U.S. at 150-53. App. E (45 U.S.C. § 152, Seventh & § 156). In order to invest these self-executing status quo requirements with judicial authority, the district court is permitted to issue an injunction ordering the parties to maintain the pre-dispute status quo while the mediation process runs its course. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n.*, 491 U.S. 299, 303 (1989).

What is critical to keep in mind in the circumstances of this case is that in order for the RLA's status quo

injunction procedure to be triggered, there must be an explicit finding that *the carrier* altered or attempted to alter the "rates of pay, rules or working conditions" covered by the collective bargaining agreement. App. E (45 U.S.C. § 156) at 72a. The RLA, it must be remembered, applies only to carriers. App. E (45 U.S.C. § 151) at 65a-66a.

Petitioner Springfield, a railroad, is a wholly owned subsidiary of Guilford Transportation Industries, Inc. (Guilford). Guilford is a closely held corporation owned by four individuals: David Andrew Fink, David Armstrong Fink, Timothy Mellon and Richard Kelso. At the time this dispute arose, these four individuals served as Directors of Springfield.

Petitioner ABR is a wood products company that is located along Springfield's railway lines. ABR is also a closely held corporation, owned by three of the four individuals who own Guilford. These three individuals also serve as ABR's Directors. ABR began its operations in 1994.

Although Springfield and ABR have some overlap in the identity of their owners,[2] there is no operational overlap whatsoever. Indeed, at all times relevant to this dispute, the only Guilford owner who exercised operational authority over Springfield was David Andrew Fink, who served as its

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[2] As the First Circuit dissent points out, it is important to note that there is a total absence in the factual record regarding the percentage ownership interest among the individual investors. Thus, for all the record discloses, Richard Kelso could own 97% of Springfield, with the Finks and Mellon owning 1% a piece. App. A at 42a.

President. Likewise, at all times relevant to this dispute, the only owner of ABR who exercised operational authority over that entity was David Armstrong Fink, who served as its President. Moreover, at all times relevant to this dispute the two corporations shared neither corporate officers, nor physical space, nor funds, nor books nor employees. They were two separate, stand-alone corporate entities principally engaged in completely different businesses.

In or about 1995, Springfield entered into collective bargaining agreements with Respondents Brotherhood of Locomotive Engineers and United Transportation Union (the Unions). These collective bargaining agreements *inter alia* govern the rates of pay, rules, and working conditions for Springfield's Union employees. One aspect of Springfield's business performed by Union employees is industrial switching. Switching is a service that has historically been provided by railroads to their line-haul freight customers. It is usually provided on the customer's own property, typically on a sidetrack.

Beginning in the early 1990s, the historical practice of railroads providing switching services to their line-haul customers began to change. In some instances, the changeover was accomplished with the help of a joint use agreement[3]; in *every* instance, Springfield assisted each of its freight customers in taking over their own switching. Specifically, Springfield employees trained employees of each freight customer in the operation of a trackmobile, which is a vehicle used to move railcars between tracks.

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[3] A joint use agreement is a contract between the railroad and its freight customer by which the customer obtains the right to use a railroad's tracks for its own switching operations.

In early 1998, because its operations were growing, ABR decided it needed to provide additional trackage for the storing, loading, unloading and switching of railroad cars over the two sidetracks that it owned and over which it had exclusive use. To satisfy its operational needs, it negotiated with its line-hauling carrier, Springfield, a standard joint use agreement identical to those referenced above. Under the agreement, ABR obtained the right to use four contiguous tracks owned and controlled by Springfield. Further, consistent with Springfield's established practice in this circumstance, Springfield representatives trained ABR employees in the use of a leased trackmobile. From Springfield's standpoint, it always viewed this service as being consistent with good business practice because the more efficient a freight customer became at switching, the more line-haul business that customer could give to Springfield.

At roughly the same time that ABR decided to do its own switching, two Springfield line-haul freight customers, Lincoln Pulp & Paper (Lincoln) and Passadumkeag Stud Mill, owned by Champion International, Inc. (Champion), complained to Springfield that it was unable to meet their scheduling needs for switching. Lincoln and Champion both indicated to Springfield their intention to make other switching arrangements. *Following* this revelation by Lincoln and Champion,[4] Springfield Vice President of Transportation

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[4] This evidence was uncontradicted. It came from Springfield's Culliford and ABR's Fink. The First Circuit majority dismisses this evidence by concluding that the District Court must not have "credited" Culliford and Fink's testimony, reasoning (it would appear) that the District Court could not have reached the result it did had it accepted the Culliford and Fink testimony. App. A at 25a. *However*, if the majority's speculation is correct, namely, that the Culliford-Fink testimony was considered by the

Sydney Culliford approached ABR President David Armstrong Fink and suggested that if ABR were not using its trackmobile to full capacity, it could maximize its use by also performing switching services for other industries along Springfield's line that wished to do their own switching. In May, 1998, ABR began performing switching operations for Lincoln and Champion. In August, 1998, the Unions brought this action seeking to enjoin ABR's third party switching activities.[5]

The District Court had jurisdiction over the original action pursuant to 28 U.S.C. §§ 1331, 1337, 1651 and 2201 because the case presented a federal question under an Act of Congress regulatory commerce. The matter was submitted to the District Court on a stipulated record. Petitioners argued for application of Maine's law of veil piercing to the question whether ABR acted as Springfield's alter ego in performing switching services for Lincoln and Champion, asserting that the record was bereft of any evidence demonstrating that such was the case. *However*, in finding that the parties were in a major dispute and issuing a permanent injunction enjoining

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District Court but rejected, upon what basis was it rejected? It was not contradicted with other testimony. It was certainly not inherently illogical. Counsel for the Unions attempted no cross-examination. Moreover, it emanated from a paper record, so the District Court was not able to observe witness demeanor. Given the importance that the District Court plainly attached to Sydney Culliford's "suggestion" that ABR consider third-party switching, it was certainly clear error for that court to have ignored the Culliford-Fink testimony regarding the timing of Lincoln and Champion's third-party switching determinations.

[5] Lincoln and Champion were ABR's only third-party switching customers.

ABR from any and all switching of Springfield's customers (thereby making ABR a constructive party to Springfield's collective bargaining agreements with the Unions), the District Court utterly failed to articulate an RLA veil-piercing standard. The court simply wrote right over the issue. App. B.

Petitioners filed a timely appeal with the Court of Appeals for the First Circuit. In affirming the District Court decision, the First Circuit majority rejected Petitioners' assertion of Maine's law of veil piercing to the question whether ABR acted as Springfield's alter ego in performing switching services for Lincoln and Champion. App. A at 11a-12a. Instead, the majority purported to fashion a federal common law veil-piercing standard for RLA status quo injunction cases:

> The rule in federal cases is founded only on the broad principle that a corporate entity may be disregarded in the interests of public convenience, fairness and equity.

App. A at 12a-13a (citation omitted). In Petitioners' view, this is not a standard at all; it is nothing more than an observation providing no guidance whatsoever to the railway industry, the courts or the bar.

ARGUMENT FOR GRANTING WRIT

This is a case of first impression. Prior to this case, no federal or state court has ever addressed the question what is the applicable standard for disregarding the corporate form in RLA status quo injunction cases. In this case, the Court of Appeals purported to fashion a federal common law veil-

piercing standard in direct contravention of this Court's decision in *O'Melveny & Myers v. Federal Deposit Insurance Corporation*.

Further, the federal common law standard which the First Circuit majority *did* purport to fashion is not a standard at all; rather, it is a mere observation. It provides no guidance whatsoever to the railway industry, the courts or the bar. The First Circuit majority's *non*-standard is a result-oriented measure undertaken to uphold a District Court decision which was based on pure speculation–*not* on evidence of record.

The need for judicial guidance from this Court in this case is acute. The question is one of national importance and application.

ARGUMENT 1

The First Circuit's decision to apply a federal common law veil-piercing standard is in direct conflict with this Court's decision in *O'Melveny & Myers v. Federal Deposit Insurance Corporation.*

This is a question of first impression. Prior to this case, no federal or state court has ever addressed the question what is the applicable standard for disregarding the corporate form in RLA status quo injunction cases.

In the landmark case of *O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 512 U.S. 79 (1994), this Court firmly and unambiguously laid down the standard for when it is appropriate for a federal court to fashion a

federal common law rule of decision in adjudicating a claim based on a federal statute. In that case, brought pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), the FDIC urged the formulation of a federal common law rule to enhance its ability, when acting in its capacity as receiver for a savings and loan corporation, to recover losses from legal counsel of the failed institution for alleged malpractice. Rejecting this effort, the Court made clear that those instances where a federal court is to resort to judge-made law in adjudicating an action based on a federal statute are "*few and restricted . . . [and] limited to situations where there is a significant conflict between some federal policy or interest and the use of state law.*" *Id.* at 87 (internal quotations and citations omitted) (emphasis added). In a passage that is noteworthy for its clarity, the Court remarked as follows:

> Our cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision. Not only the permissibility but also the scope of judicial displacement of state rules turns upon such a conflict. What is fatal to respondent's position in the present case is that it has identified no significant conflict with an identifiable federal policy or interest. There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity.
>
> . . . .
>
> Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing

> uncertainty–but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in 'federal common-law' rules.

Id. at 87-88 (citations omitted).

As this Court has pointedly observed in the past, "Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." *Burks v. Lasker*, 441 U.S. 471, 478 (1979). Thus, in *United States v. Bestfoods*, 524 U.S. 51 (1998), when faced with the question whether under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary, the Court recognized the longstanding state law rule of limited corporate liability. *Id.* at 61-62. The Court remarked as follows:

> [I]t is hornbook law that the exercise of the control that stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary. That control includes the election of directors, the making of by-laws . . . and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal. Although this respect for corporate distinctions when the subsidiary is a polluter has been severely criticized in the literature, nothing in CERCLA purports to reject this

> bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible.

Id. (internal quotation and citations omitted).

So, too, in the case of the RLA. There is nothing in the RLA which suggests any lessened respect for the venerable state common law doctrine of the separate existence of corporations. App. E.

In *Bestfoods*, the Court also recognized the widespread *state law* doctrine of veil piercing whereby "the corporate veil may be pierced . . . *when . . . the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on a shareholder's behalf.*" *Id.* at 62 (emphasis added). This is essentially Maine's common law veil-piercing standard which Petitioners urged on both the District Court and the First Circuit in this case. *See Theberge v. Darbro, Inc.*, 684 A.2d 1298, 1301 (Me. 1996); *Johnson v. Exclusive Properties Unlimited*, 720 A.2d 568, 570 (Me. 1998).

In deciding to fashion a federal common law veil-piercing standard, the First Circuit majority relied *solely* on the very criterion which this Court so eloquently rejected in *O'Melveny & Myers*: *uniformity*. *See* App. A at 11a-12a. Making reference to no particular provision of the statute, nor any of its legislative history, the majority merely declared: "National uniformity is particularly important in those RLA cases, like this one, that implicate the consensual processes which labor law was designed to promote." App. A at 11a (quotation omitted).

It is Petitioners' position that the interest in a uniform veil-piercing standard in RLA status quo injunction cases does not require a *federal* common law veil-piercing standard. The common law standard recognized by this Court in *Bestfoods*, set forth above, is essentially the veil-piercing standard found in most states. *See Darbro, Inc.*, 684 A.2d at 1301; *Johnson*, 720 A.2d at 570. *See also In Re Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. 22, 33 (Mass. 1987) (noting that the question is essentially an academic one, as state veil-piercing jurisprudence is relied upon by the federal courts). Moreover, this is precisely the question in the context of CERCLA that this Court left unanswered in *Bestfoods*. *See United States v. Bestfoods*, 524 U.S. at 63 n. 9.

Accordingly, for all of the reasons set forth above, this Court should seize this opportunity to decide the important question whether or not a federal common law veil-piercing standard is needed in RLA status quo injunction cases.

ARGUMENT 2

The question what veil-piercing standard should apply in federal Railway Labor Act status quo injunction cases is of such national importance that it should be settled by this Court.

Even assuming that the First Circuit majority was correct in its decision to fashion a federal common law veil-piercing standard in RLA status quo injunction cases, the standard articulated by the majority is not a standard at all; rather, it is a mere observation. It provides no guidance whatsoever to the railway industry, the courts or the bar. As

this Court recognized in *Bestfoods*, the *sine qua non* of veil piercing is shareholder abuse of the corporate form to accomplish a wrongful purpose.

Petitioners respectfully submit that the majority's fashioning of the above-quoted open-ended *non*-standard was a result-oriented measure aimed at upholding the District Court's decision in this case. Indeed, only with such a *non*-standard could the *speculation* that ABR's switching of Lincoln and Champion was undertaken for the predominant purpose of avoiding *Springfield's* RLA status quo obligations justify a piercing decision in this case. It must be remembered that the burden of proof in veil-piercing cases at all times rests with the party seeking to disregard the corporate form. *See National Soffet & Escutcheons, Inc. v. Superior Sys., Inc.*, 98 F.3d 262, 265 (7th Cir. 1996); *Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069 (3rd Cir. 1979). As the First Circuit dissent aptly pointed out, the only proof presented by the Unions going to their veil-piercing burden was the bare fact of the overlap in identity of ownership. As further pointed out by the dissent, however, even this showing was undermined due to the Union's failure to present proof of an overlap in *percentage* of ownership, as opposed merely to *identity* of ownership. App. A. at 42a.

As set forth above, no federal or state court has ever addressed the issue of what is the applicable standard for disregarding the corporate form in RLA status quo injunction cases such as this one. Although Petitioners contend that a federal common law standard is not necessary, they emphatically assert that the railway industry, the courts and the bar are in desperate need of clear guidance on this critical issue. This is a question of national importance. It should be settled by this Court.

CONCLUSION

The decision of the First Circuit Court of Appeals in this case is inconsistent with this Court's landmark decision in *O'Melveny & Myers v. Federal Deposit Insurance Corporation*. There is no necessity to fashion a federal common law veil-piercing standard in RLA status quo injunction cases. More importantly, the federal common law standard that the First Circuit majority *did* purport to fashion is not a standard at all; it is nothing more than an observation. It provides no guidance whatsoever to the railway industry, the courts or the bar. Due to the national importance of this question, Supreme Court guidance is necessary and critical to provide a substantive veil-piercing standard in RLA status quo injunction cases that requires, at the very least, palpable shareholder abuse of the corporate form to accomplish an improper purpose.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Filed April 5, 2000]

No. No. 99-1328

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED TRANSPORTATION UNION,
Plaintiffs, Appellees,

v.

SPRINGFIELD TERMINAL RAILWAY COMPANY, AROOSTOOK AND BANGOR RESOURCES, INC.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. D. Brock Hornby, U.S. District Judge]

Before
Stahl, Circuit Judge
Cyr, Senior Circuit Judge,
and Lipez, Circuit Judge.

LIPEZ, Circuit Judge. This case requires us to decide whether the district court properly issued a Railway Labor Act ("RLA") injunction barring a wood products company controlled by owners of a railroad from doing switching work historically performed by the railroad's unions. *See* 45 U.S.C. § 151 and seq. The district court issued the injunction after finding that the Brotherhood of Locomotive Engineers and United Transportation Union (the "Unions") were engaged in a "major" dispute with Springfield Terminal Railway Company ("Springfield") and that Springfield was using Aroostook and Bangor Resources, Inc. ("ABR") to violate its collective bargaining agreement. Springfield and ABR (the "appellants") argue that ABR, although owned and controlled by Springfield's owners, is an independent wood products company not subject to the RLA and therefore not subject to the district court's order that it stop performing switching for Springfield customers while RLA mediation procedures are underway. We reject the contention that ABR is not subject to the injunctive provisions of the RLA, and we affirm both the district court's finding that there was a "major" dispute between Springfield and its Unions and the district court's injunction against ABR.

I.

A. The Labor Dispute

We begin by sketching the facts of this labor dispute, reserving for later a more detailed discussion of the district court's findings. In doing so, "[w]e recite the facts in the light most favorable to the district court's findings of fact." *Servicos Comerciales Andinos v. General Electric Del Caribe, Inc.*, 145 F.3d 463, 466 (1st Cir. 1998).

In 1995 the Unions and Springfield negotiated a collective bargaining agreement that governs the rates of pay, rules, and working conditions for Springfield locomotive engineers, conductors, and trainmen. The agreement specifically provides that union employees "shall perform any and all services under the direct control of the Carrier required for the make up of trains and/or the movement of cars and trains over and through the Carrier's trackage and in its business of servicing industrial sidings."

One such "business of servicing industrial sidings" is switching, a service that rail carriers often provide for their customers on the customers' properties. Springfield employees who are union members have historically provided this service to many of Springfield's line-haul railway customers. Pursuant to the collective bargaining agreement, the union members performing these switching services have been paid and treated identically to engineers, conductors, and trainmen involved in other aspects of Springfield's railway business.

In 1996 Springfield proposed that the union members engaged in switching accept a twenty-six percent pay cut and less favorable working conditions. Although the Unions' leaders initially resisted, they eventually agreed to submit a proposed pay cut to their respective memberships. The memberships of both Unions rejected the changes in August 1996, opting instead to maintain the more favorable terms of the collective bargaining agreement. Despite the vote, Springfield persisted in seeking a pay cut for switching work.

Unable to persuade the Unions to accept lower pay for switching, Springfield took a series of steps in the spring of

1998 that resulted in ABR performing switching that had previously been done by Springfield's unions. ABR is a non-unionized company located along Springfield's railway lines engaged primarily in the manufacture of clothes pins and other wood products. Springfield executed an agreement with ABR in April 1998 giving ABR joint use of some railway tracks, and Springfield personnel trained two nonunion ABR employees to use a leased track-mobile to perform the switching at the ABR wood products mill previously done by Springfield's union employees. While joint use agreements of this type are fairly common in the railway industry, Springfield's next move was unusual. Shortly after executing the joint use agreement, Springfield suggested to ABR that it truck its switching equipment from place to place so that it could perform switching work for various Springfield railway customers that had previously used Springfield (and the Unions) for switching. ABR agreed and by May of 1998 it was providing switching services for Springfield customers Lincoln Pulp & Paper ("Lincoln") and Passadumkeag Stud Mill, owned by Champion International, Inc. ("Champion"). ABR also investigated performing switching work for other Springfield customers.

Although nominally an independent corporation, ABR is not unrelated to Springfield. Springfield is a wholly owned subsidiary of Guilford Transportation Industries, Inc. ("Guilford"), a holding company that owns several railroads in New England.[1] Guilford, in turn, was closely held (at the

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[1] Gilford's holdings include the Maine Central Railway, the Portland Terminal Company and the Boston & Maine Corporation.

time of the dispute) by four individuals who also served as its directors: David Andrew Fink, David Armstrong Fink, Richard Kelso and Timothy Mellon. Both of the Finks and Mellon were also the sole owners of ABR. The three companies shared the same four directors at the time the dispute arose: all three ABR owners plus Richard Kelso. While David Andrew Fink served as President of Springfield, his son, David Armstrong Fink, served as President of ABR (as well as a Director of Guilford and, later, as an Executive Vice-President at Springfield). It was David Armstrong Fink who met with a Springfield vice-president involved in the failed labor negotiations about the possibility of ABR performing the switching work previously done by the Unions.

B. The Railway Labor Act

The Unions filed suit under the RLA, arguing that Springfield was using ABR to violate the terms of its collective bargaining agreement. Under the RLA, a district court has no jurisdiction to rule on the merits of a labor dispute. Rather, the court may only decide what type of statutorily mandated dispute resolution procedure is appropriate, depending on the category of the dispute. *See Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 722-23 (1945). Minor disputes under the RLA are those in which the carrier's challenged policies are at least arguably permitted under the existing collective bargaining agreement.[2] If the

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[2] A minor dispute

contemplates the existence of a collective

dispute is "minor," the district court dismisses the case in favor of binding arbitration. Major disputes, on the other hand, relate to carrier attempts to modify rates of pay, rules or working conditions in a fashion not even arguably covered by the collective bargaining agreement.[3] *See Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 797 (1st Cir. 1986); *Maine Central R.R., Co. v. United Transp. Union*, 787 F.2d 780, 782 (1st Cir. 1986). If the dispute is "major," the Act provides for extensive, non-

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> agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . In either case the claim is to rights accrued, not merely to have new ones created for the future.

Elgin, 325 U.S. at 723.

[3] A major dispute

> relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

Elgin, 325 U.S. at 723.

binding mediation procedures.[4] In major disputes—unlike minor disputes—the RLA bars the carrier from implementing the contested change until the mediation efforts are exhausted. *See Detroit and Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 150-53 (1969). To invest these status quo requirements with judicial authority, the district court is permitted to issue an injunction ordering the parties to maintain the pre-dispute status quo while the mediation procedures take place. *See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 303 (1989) ("The district courts have subject-matter jurisdiction to enjoin a violation of the status quo pending completion of the required procedures. . . .").

C. The District Court Proceedings

The Unions argued to the district court that the arrangement between Springfield and ABR created a major dispute because Springfield was seeking to modify the collective bargaining agreement's rules on pay and working conditions for those engaged in switching. The Unions claimed that Springfield was using ABR to implement this contested change before RLA mediation procedures were exhausted, thereby violating the RLA's requirement that the carrier and union maintain the pre-dispute status quo. The

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[4] The dispute resolution procedures for major disputes include a "rather elaborate machinery for negotiations, mediation, voluntary arbitration, and conciliation." *Detroit and Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 148-49 (1969). For simplicity's sake, we will refer to all of these processes as the major dispute "mediation" procedures.

appellants objected, arguing, *inter alia*, that Springfield had not done anything to alter the collective bargaining agreement and that ABR was acting independently in performing switching work for Springfield customers.

On the basis of a stipulated record, the district court ruled that the dispute was major under the RLA. In so concluding, the court found that Springfield was attempting to evade the collective bargaining agreement by "allow[ing] a corporate relative not bound by the collective bargaining agreement to perform work covered by the collective bargaining agreement." The court also rejected the appellants' other defenses: their assertion that the arrangement with ABR did not alter the pay or working conditions of the Unions and their assertion that the arrangement was covered by "implied terms" in the collective bargaining agreement. The court then enjoined ABR from performing industrial switching for Lincoln, Champion and any companies for which Springfield currently provided switching services, pending the outcome of the RLA mediation procedures. ABR and Springfield appeal.[5]

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[5] The Unions have suggested that we lack jurisdiction over this appeal because the Appellants filed their notice of appeal before the injunction was formally recorded. We disagree.

When the district court entered its order on February 5, 1999, it asked the Unions to prepare the formal language of the injunction, to present that language to the defendants, and to file it with the court by February 19. The Unions did so, and on March 2, 1999, the district court signed the injunction. Prior to the court's approval of the injunction's language, Springfield and ABR filed their notice of appeal.

II.

Appellants assert that there is no major dispute under the RLA because Springfield made no changes at all to the collective bargaining agreement. Rather, appellants claim, Springfield's rail customers simply chose to use ABR for better service of their switching needs. Since ABR is a company independent from Springfield--a wood products shop and not a railway--the district court erred in attributing ABR's actions to Springfield, despite the nearly total overlap in ownership.

We agree with Springfield that the dispute cannot be labeled "major" simply because the collective bargaining agreement required switching to be performed by the Unions. If ABR was truly acting on its own, an injunction against ABR would have been improper. The collective bargaining

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A decision is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Firestone Tire & Rubber Co. v. Risiord*, 449 U.S. 368, 373 (1981) (internal quotation marks and citation omitted). The Supreme Court has allowed appeals even when a district court still anticipated "[f]urther rulings . . . in administering its decree." *Brown Shoe Co. v. United States*, 370 U.S. 294, 308 (1962); *see also Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (" question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order."). At the time the appeal was filed, the district court had already ruled that the dispute was major and that a status quo injunction was needed. The fact that wording had not been determined did not defeat the judgment's finality.

agreement is between Springfield and the Unions; ABR is not a party. Moreover, the RLA applies only to carriers; ABR is not a carrier. *See* 45 U.S.C. § 151, First. Unless the district court properly treated ABR as the alter ego of Springfield, and properly disregarded the separateness of the two corporations by piercing the corporate veil of ABR, it could not attribute ABR's conduct to Springfield and enjoin ABR from switching Springfield customers. We must therefore assess whether veil piercing was appropriate.

In doing so, we must be clear about the sense in which we are using these terms. *See* Note, *Piercing the Corporate Veil: The Alter Ego Doctrine under Federal Common Law*, 95 Harv. L. Rev 853 (1982) (noting that the terms are amorphous). To pierce a corporate veil means to disregard its corporate formalities. *See* Black's Law Dictionary 1168 (7th ed. 1999) (noting that "piercing the corporate veil" and "disregarding the corporate entity" are the same thing). The veil may be pierced if one corporation is not an independent entity, but rather the mere "alter ego" of another. 1 James D. Cox, Thomas Lee Hazen & F; Hodge O'Neal, Corporations § 7.8 at 7.17 (1995); *cf.* Black's Law Dictionary 385 (7th ed. 1999) (defining "alter ego" as a "corporation used by an individual to conduct personal business"). In this case, ABR is Springfield's "alter ego" in the context of this labor dispute if ABR is acting as a non-union branch of Springfield rather than as an independent company. Likewise, when we speak of "piercing" ABR's veil, we mean simply disregarding its corporate separateness in the limited context where it is allegedly serving as an alter ego.

A. Federal Common Law of Veil Piercing

We must determine whether state law or federal common law governs the veil-piercing inquiry. In federal question cases, such as this one, we look to federal choice of law principles. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981); *see also Edelmann v. Chase Manhattan Bank*, 861 F.2d 1291, 1294 (1st Cir. 1988). If the federal statute in question demands national uniformity, federal common law, provides the determinative rules of decision. *See United States v Kimbell Foods Inc.*, 440 U.S. 715, 728 (1979).

National uniformity is essential in the interpretation of labor law. Federal courts have fashioned a body of federal common law to govern labor disputes, recognizing that harmonious labor relations are essential to interstate commerce. *See, e.g., Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). This general principle holds true for the RLA, a statute described as an industry-wide bargain between carriers and their unions aimed at preventing disruptions to interstate commerce. *See Shore Line*, 396 U.S. at 148-49; *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 432 (1989) (noting that "federal common labor law . . . may be helpful in deciding cases under the RLA."). National uniformity is particularly important in those RLA cases, like this one, that "implicate the consensual processes which labor law was designed to promote." *International Ass'n of Machinists & Aerospace Workers v. Aloha Airlines, Inc.*, 790 F.2d 727, 734 (9th Cir. 1986).

A common federal standard is particularly needed in RLA veil-piercing cases. If courts were to rely on state law to determine when veil piercing was appropriate, RLA collective bargaining agreements might include some companies in one state and other companies in a neighboring state. A railway with operations in more than one state could find itself unable to determine whether and when the RLA applied to it at all. Likewise, a federal veil-piercing standard is required to prevent carriers from using non-carriers (which are not themselves subject to the RLA) to circumvent federal labor law requirements. Although state law creates the corporate form, "the question of liability [for violation of federal regulations] is a federal question. The policy underlying a federal statute may not be defeated by an assertion of state power." *Anderson v. Abott*, 321 U.S. 349, 365 (1944) (piercing the veil); *H.P. Lambert Co. v. Secretary of the Treasury*, 354 F.2d 819, 822 (1st Cir. 1965) ("However important it may be in other respects, the fiction of the corporate entity cannot stand athwart sound regulatory procedure.").

To say that federal common law applies in this case does not fully resolve the matter. As we recently acknowledged, the federal standard "for when it is proper to pierce the corporate veil is notably imprecise and fact-intensive." Crane v Green & Freedman Baking Co., 134 F.3d 17, 21 (1st Cir. 1998); *see also* Note, *supra*, 95 Harv. L. Rev, at 852 (noting that federal common law on veil piercing is amorphous and must be flexibly applied). Federal courts are not bound by "the strict standards of the common law alter ego doctrine which would apply in a tort or contract action." *Capital Tel. Co. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974). Nor is there any "litmus test in the federal courts

governing when to disregard corporate form." *Alman v. Danin*, 801 F.2d 1, 3 (1st Cir. 1986). Instead, the rule in federal cases is founded only on the broad principle that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981).

In *Gorsuch* we recognized that this principle must be applied with sensitivity to the demands of the federal statute at issue:

> In applying this rule, federal courts will look closely to the purpose of the federal statute to determine whether the statute places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine.

Id. (internal citations omitted), *see also First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983). ("[T]he Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies."); *United Elect., Radio and Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1091 (1st Cir. 1992) ("[I]n federal question cases, courts are wary of allowing the corporate form to stymie legislative policies"). Given the need to consider the purposes of the federal statute, we have crafted what we termed a "less rigorous" veil-piercing standard tailored to ERISA cases in order to fulfill that statute's goals. *163 Pleasant St.*, 960 F.2d at 1092 ("The rationale for encouraging a modicum of corporate disregard in ERISA cases is grounded on

congressional intent."); *see also Alman v. Danin*, 801 F.2d 1, 4 (1st Cir. 1986) ("Indeed, deferring too readily to the corporate identity may run contrary to the explicit purposes of [ERISA]." Other Circuits too have considered the specific legislative policies at issue and whether piercing the corporate veil is necessary to further those policies. *See Stotter & Co. v. Amstar Corp.*, 579 F.2d 13, 18-19 (3rd Cir. 1978) (veil piercing necessary to fulfill purposes of Clayton Act); *Capital Tel. Co.*, 498 F.2d at 738 (liberal veil piercing to fulfill purposes of Communications Act of 1934); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710, 716-17 (7th Cir. 1965) (veil piercing necessary to fulfill purposes of Dealers' Day in Court Act). We must therefore consider the RLA status quo provisions to determine when veil-piercing is necessary to prevent frustration of the RLA's purposes.

B. The Railway Labor Act and Veil Piercing

"[T]he major purpose of Congress in passing the Railway Labor Act was to provide a machinery to prevent strikes." *Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930) (internal quotation marks omitted). The risk of strikes was considered to be "particularly acute in the area of 'major disputes,' those disputes involving the formation of collective agreements and efforts to change them." *Shore Line*, 396 U.S. at 148. For these disputes, the railroad and union representatives who drafted the Act favored non-binding mediation. *See id.* at 148-49. To prevent strikes from breaking out while mediation was underway, the Act required that both parties maintain the pre-dispute status quo. *See id.* at 149. As the Court noted in *Shore Line*, the Act's status quo provision was "central to its design":

> Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worth while for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.

Id. at 150. The Act fashioned a fundamental compromise: during the RLA mediation procedures, the union must refrain from striking and the carrier must refrain from implementing the contested policy.

The *Shore Line* Court emphasized that the status quo provisions of the RLA must be applied flexibly to fulfill the statute's goal. In Shore Line, the carrier had argued that the RLA required it to preserve the status quo only in those working conditions explicitly covered by the parties' collective bargaining agreement. *See id.* at 147-48. Since the collective bargaining agreement was silent on the challenged practice, the carrier argued that it should be allowed to continue this practice while RLA mediation to modify the

agreement was ongoing. *See id.* The Court rejected this interpretation, calling it "fundamentally at odds with the Act's primary objective -- the prevention of strikes. . . . If the railroad is free at this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike." *Id.* at 154-55. The Court therefore held that the status quo provision must be "broadly conceived" to preserve the "actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing collective agreement." Id. at 143.

The Court's effort to give practical meaning to the status quo requirement would be circumvented if carriers could use third parties to alter the collective bargaining agreement while the dispute was ongoing. Thus courts have held that a carrier may not hire an independent company to carry out the changes that the unions protest. *See e.g.*, *St Louis S.W. Ry. v. Brotherhood of R.R. Signalmen*, 665 F.2d 987, 995 (10th Cir. 1981) ("There is nothing which leaves room for a suggestion that the [RLA] can be avoided by employing a contractor to perform the work."). In the same vein, the RLA is defeated if a carrier uses a related corporation to alter the status quo. The RLA itself acknowledges the possibility that carriers may attempt to use affiliates to achieve their goals by giving courts jurisdiction over railroads and those non-railroads that are "directly or indirectly owned or controlled by or under common control with any carrier by railroad. . . ." 45 U.S.C. § 151. While this provision alone does not justify the issuance of an injunction against a non-railroad corporation, it emphasizes that courts must look beyond corporate formalities if the

nominally independent corporation is serving as the alter ego of the carrier.

In several cases, courts have engaged in veil piercing when the carrier used an affiliate to escape its collective bargaining-agreement and violate the status quo requirements of the RLA. In *Burlington Northern R.R. Co. v. United Transp. Union*, 862 F.2d 1266 (7th Cir. 1988), the railroad, after failing to convince a local union to accept smaller crews for a particular train service, transferred the work to a subsidiary, Winona Bridge. Finding that the subsidiary was "serving as the alter ego" of the carrier, the court held that "a carrier cannot evade its duties under a collective bargaining agreement or the RLA by directing business to an entity within the same corporate family and not obligated by the existing collective bargaining agreement." *Id.* at 1275. Similarly, in *Butte, Anaconda & Pacific Ry. v. Brotherhood of Locomotive Firemen and Enginemen*, the carrier argued that its major dispute mediation procedures could be "terminated" after a wholly owned subsidiary began performing the disputed work. 268 F. 2d 54, 59 (9th Cir. 1959). The court acknowledged that there would no longer be a major dispute if the work was performed by "an independent shipper, not acting in concert with its carrier." *Id.* After assessing the links between carrier and subsidiary, however, the court held that the acts of the latter "must be regarded as the act of the carrier. Otherwise, a carrier by interrelation with its shippers would always have it within its

power to circumvent the mediation provision of the Railway Labor Act." *Id.* at 59-60.[6]

Noting that neither *Burlington* nor *Butte* detail the standard that must be applied in an RLA veil-piercing inquiry, appellants claim that these cases support RLA veil piercing *only* when the pierced corporation is a wholly owned subsidiary of the carrier. We reject this reading. First, while these cases deal with wholly owned subsidiaries, they do not state that veil piercing is inappropriate for other types of corporate relatives. In fact, *Burlington* speaks of piercing not just subsidiaries, but of entities in the same corporate family." 862 F.2d at 1275. While alter ego liability may be most common in an ordinary parent-subsidiary context, "the equitable doctrine of piercing the corporate veil is not limited to the parent-subsidiary relationship." *C M Corp. v. Oberer Dev. Co.*, 631 F.2d 536, 538 (7th Cir. 1980). Indeed, "[t]he separate corporateness of affiliated corporations owned by the same parent may be equally disregarded under the proper

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[6] Other courts have also noted that a carrier cannot evade the requirements of the RLA (which applies to air carriers as well as railroads) by transferring work to a corporate relative not party to the collective bargaining agreement. *See Air Line Pilots Ass'n, Int'l. v. Transamerica Airlines, Inc.*, 817 F.2d 510 (9th Cir.1987) (noting that a carrier would violate the RLA status quo requirements if the union could prove that it transferred work to a subsidiary to evade these requirements); *Air Line Pilots Ass'n, Int'l. v. Texas Intl 'Airlines, Inc.*, 656 F.2d 16, 19 (2d Cir. 1981) ("Nor could TXI permissibly transfer existing business flown by ALPA pilots to a newly formed corporate alter ego for the purpose of displacing the work of ALPA pilots.").

circumstances." *In re Bowen Transps., Inc.*, 551 F.2d 171, 179 (7th Cir. 1977). Courts have pierced the veil in cases involving "sibling" corporations, and in cases involving even more intricately arranged corporate structures. *See Minnesota Power v. Armco, Inc.*, 937 F.2d 1363, 1364 (8th Cir. 1991) (complex partnership scheme); *cf. Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984) ("[W]e see no relevant difference between a corporation wholly owned by another corporation, two corporations wholly owned by a third corporation or two corporations wholly owned by three persons who together manage all affairs of the two corporations."). The misuse of the corporate form to evade federal regulatory requirements may be easier to prove, as an evidentiary matter, when there is a straightforward parent-subsidiary relationship. However, the RLA status quo provisions could be thwarted if courts were categorically barred from considering other types of corporate relationships that were being used to avoid a collective bargaining agreement.

Of course, the corporate ties between the carrier and the related corporation provide only a starting point for the analysis. Common ownership by itself is insufficient to pierce the veil. *See United States v. Bestfoods*, 118 S. Ct. 1876, 1884 (1998) ("[A] parent corporation . . . is not liable for the acts of its subsidiaries."). The record must include evidence that the carrier used the related corporation for the purpose of evading the collective bargaining agreement and the status quo requirements of the RLA. In making this determination, no single factor is dispositive. The district court may consider the chronology of events: if the carrier only transferred work to the related corporation after unsuccessful union negotiations, that fact may suggest that the carrier shifted the

work in an effort to avoid the RLA status quo provisions. *See Burlington*, 862 F.2d at 1274 ("Thus Burlington plainly acknowledged that Winona Bridge was Burlington's second choice, an alternative to unsuccessful union negotiations."). That inference of evasion may be stronger when the work shifted to the related corporation is distinct from the related corporation's primary line of business. Other factors may also be relevant, such as whether the carrier and, the related corporation fail to observe separate corporate formalities, or whether the related corporation is undercapitalized. *See id.* at 1276 n.6 (noting that subsidiary had "no equipment or rail-service employees").

We emphasize, however, that the record need not portray the related corporation as a "sham" business, expressly created or operated primarily to defeat the RLA. In *Butte*, for example, the subsidiary had been created and then operated as a separate, legitimate business until the railroad used it to defeat the RLA obligations. 268 F. 2d at 54. It would make little sense to ignore current relationships and arrangements between corporations, and thereby grant the railroad immunity from veil piercing, in those cases where the related corporation being used to defeat the RLA was originally formed (or simultaneously used) for a legitimate purpose.

It must be remembered that veil piercing in the RLA context serves a different function than it does in the ordinary state law veil piercing cases. In a typical tort or contract case, the primary purpose of the veil-piercing analysis is exposure of the assets of one corporation for payment of the debts or obligations of a related corporation. In the RLA major dispute proceedings, veil piercing operates only to

block the related corporation from assisting the carrier in altering the collective bargaining agreement before mediation procedures are exhausted. Indeed, there is no final judgment on the merits against the related corporation: if the RLA mediation procedures do not achieve a negotiated solution, the law will not block the related corporation from engaging in the contested activities. *See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n.*, 491 U.S. 299, 303 (1989) ("Once this protracted process ends and no agreement has been reached, the parties may resort to the use of economic force."); *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R.*, 372 U.S. 284, 291 (1963).

In this way, RLA veil piercing is similar to the well-established practice of extending the scope of an injunction to include non-parties acting in concert with parties to defeat the injunction's purpose. *See* Fed. R. Civ. P. 65(d) (injunctions can block activities of non-parties who act "in active concert or participation" with enjoined parties). In RLA cases (unlike in most cases where injunctions are sought), the substantive law itself imposes the duty to maintain the status quo. In a major dispute, the Act requires that "rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has finally been acted upon" through the Act's mediation procedures. 45 U.S.C. § 156; *see also Shore Line* 396 U.S. at 150-53 (describing various status quo provisions in the RLA). If in subsequent proceedings the district court determines that the carrier is acting in concert with a related corporation to violate these self-executing status quo provisions, the injunction should be fashioned to reach the related corporation as well.

With these principles in mind, we turn to the findings of the district court.

C. The District Court's Findings

While we review the district court's legal conclusions de novo, *see Sierra Fria Corp. v. Donald J. Evans P.C.*, 127 F 3d 175, 181 (1st Cir. 1997), we accept its factual findings unless they are clearly erroneous. *See* Fed. R. Civ. P. 52(a). Moreover, "[i]t is now settled beyond peradventure that findings of fact do not forfeit 'clearly erroneous' deference merely because they stem from a paper record." *RCI Northeast Servs. Div. v. Boston Edison Co.*, 822 F.2d 199, 202 (1st Cir. 1987). Whether the evidence is sufficient to pierce the veil "is a question of law. But given the issue's fact-intensive nature, the legal threshold of evidentiary sufficiency is a relatively low one." *Crane*, 134 F.3d at 22. We must therefore review the record in the light most favorable to the district court's findings. *See Servicos Comerciales Andinos v. General Elec. Del Caribe, Inc.*, 145 F.3d 463, 466 (1st Cir. 1998).

The district court decided the case on a stipulated record containing deposition transcripts and affidavits from key Springfield, ABR and union leaders. Not surprisingly, the parties offered divergent views of the circumstantial evidence. Springfield relied on ABR's formal corporate separateness from the railroad, and emphasized the undisputed fact that ABR had been formed prior to the labor dispute and was engaged in a separate, legitimate business (paper products manufacturing). It asked the court to view Springfield's suggestion to ABR that it perform switching as merely a friendly business gesture from one independent corporation to

another, designed solely to promote each company's efficiency. The Unions, by contrast, argued that the same evidence showed that Springfield sought out ABR's assistance only to thwart the RLA processes. In support of its interpretation, the Unions emphasized common ownership of Springfield and ABR, the chronology of events, and the fact that the same Springfield managers involved in the failed labor negotiations were instrumental in persuading ABR to perform switching for Lincoln and Champion. In a case submitted for judgment on a stipulated record, the district court resolves disputed issues of material fact. *See Boston Five Cents Sav. Bank v. Secretary of the Dep't of Hous. and Urban Dev.*, 768 F 2d 5, 11-12 (1st Cir. 1985).

While the appellants (and our dissenting colleague) continue to characterize Springfield's motivation as benign, the district court plainly rejected the claim that ABR was acting as an independent corporation. Rather, the court found that the conduct of Springfield was analogous to that of the carrier in *Burlington*, a case in which the carrier used a subsidiary alter ego to violate its collective bargaining agreement and the RLA. Noting that it could "look beyond the surface . . . to see whether the disputed practice is in reality an attempt to evade the collective bargaining agreement," the court concluded that Springfield's arrangement with ABR was an "attempt[] to change unilaterally the terms" of its deal with the Unions. The court pointed to both the "close family relationship" among the corporations and the fact that the transfer of switching came only after Springfield's "failed attempt to negotiate more favorable terms for the work that ABR is now doing on a nonunion basis." The court drew a distinction between Springfield assisting ABR in taking over its own switching--a

fairly common industry practice -- and Springfield's suggestion that ABR should travel to other Springfield customers and perform the switching work that the Unions had refused to do for lower pay.

While the evidence supporting the district court's finding that Springfield used ABR to circumvent its collective bargaining agreement with the Unions was circumstantial, there was, contrary to the insistence of the dissent, sufficient evidence to support that conclusion. First, the district court properly noted that the overlap in ownership between Springfield and ABR was almost total. Three of the four individuals who owned Springfield (through the Guilford holding company) were the sole owners of ABR. At the time the dispute arose, the three corporations (Guilford, Springfield and ABR) had the same four directors: specifically, the three owners of ABR, plus Richard Kelso.

Although the "close family relationship" between ABR and Springfield is not dispositive of the veil-piercing inquiry, the district court also properly relied upon a chronology of events which supports an inference that Springfield was using ABR to violate its collective bargaining agreement and defeat the RLA status quo requirements. Notably, Springfield only invited ABR to start performing switching for its customers after Springfield was unable to convince the Unions to accept wage concessions. Also, the Springfield vice-president who approached ABR, Sydney Culliford, was described by one union leader as the key player in the failed labor negotiations. Likewise, the ABR executive who decided that the wood products shop should start switching for Springfield customers was David Armstrong Fink, who in addition to being President of ABR was also an owner of Guilford and director

of Springfield (and several months later, Springfield's executive vice-president). It was not unreasonable for the district court to conclude that the work was shifted to ABR after the first round of failed negotiations as a way of pressuring the Unions to accept wage concessions, and circumventing the RLA strictures that bar these unilateral changes.[7]

The dissent argues that this reading of the evidence must be rejected because ABR only performed switching for Springfield customers Lincoln and Champion after they had already (and independently) decided to stop using Springfield for switching. However, the only evidence that Lincoln and Champion had chosen to end their switching agreement with Springfield before ABR was presented as an alternative comes from assertions by Springfield managers and officers. The district court did not credit this version of events in its opinion, and nothing compelled it to do so. Springfield and ABR officials participated together in discussions with Lincoln and Champion over who should perform the switching. ABR President David Fink (an owner of Springfield through Guilford) stated at his deposition that he

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[7] The dissent insists that RLA veil piercing requires "fraudulent intent" or "moral culpability." *Post* at 40. Without necessarily accepting that specific formulation of the requirement, there is no question that a manipulation of the corporate form to circumvent a federal regulatory scheme is sufficiently blameworthy to meet this standard. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983) ("[T]he Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies.")

and Springfield's Culliford met together with Lincoln managers to discuss how ABR could fulfill switching needs previously performed by the Unions. Other evidence indicates that even after ABR took over the day-to-day switching work, Lincoln saw ABR as simply the non-union switching arm of Springfield. On one occasion when Lincoln needed to change its switching schedule, it wrote a letter to Springfield, not ABR, informing it of its needs.

Moreover, even after Springfield directed[8] switching work to ABR, and even after this litigation was filed, it continued to seek wage concessions on switching from the Unions. *See Burlington*, 862 F.2d at 1276 n.6 ("If [carrier] and [subsidiary] were truly distinct entities, further negotiation would have been moot" following the decision to transfer work to the subsidiary.). One union leader, Michael Twombley, claims that Culliford--the Springfield Vice-President who had suggested that ABR take over switching work to begin with--approached him and asked the Unions to make a reasonable offer so that Springfield could perform switching for International Paper mill plants. A second union

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[8] The dissent claims that it is wrong to suggest that Springfield "directed" work to ABR, arguing that the district court's opinion and record only prove that "Springfield facilitated ABR's obtaining outside switching work." *Post* at 35 n.5. However, the district court plainly determined that Springfield had directed the business to ABR, finding that "Springfield Terminal's claim that it is not attempting to change unilaterally the terms of the collective bargaining agreement is totally implausible." As discussed above, the record supports a finding that Springfield transferred some of its switching to ABR.

leader, Michael Maloof, was told by Springfield's labor relations head, Roland Dinsdale, that Springfield wanted union concessions so that it could win switching business from the independent contractor, Rail Link.

Given that Springfield was still actively looking for switching work, it is difficult to fathom why Springfield would want to assist ABR if the latter were truly independent. Union negotiator Maloof asked this very question when Dinsdale told the Unions to accept wage concessions so that Springfield could compete against switching bids being made by various independent contractors. According to Maloof, Dinsdale told him that Springfield was concerned with independent contractor bids, but not with ABR, because Springfield controlled ABR.

Taken together, this evidence amply supports the conclusions that ABR was not acting as an independent company in providing switching services, that Springfield was attempting to convert two of ABR's thirty-four employees into its non-union switching arm, and that Springfield was using ABR as a lever against the Unions, pressuring them to accept lower pay by changing the status quo in the middle of negotiations. Given that a central purpose of the RLA is to block such tactics, *see Shore Line*, 396 U.S. at 148, the district court did not err in enjoining ABR from switching Springfield consignees while Springfield and the Unions completed the RLA mediation procedures.

III.

In addition to the claims of improper veil piercing, the appellants raise several miscellaneous objections to the district court's major dispute determination.

A. Change in Pay, Rules or Working Conditions

The appellants argue that the dispute was not major because it failed to produce a change in "pay, rules or working conditions" for the Unions. 45 U.S.C. § 152. According to appellants, the Unions did not provide "any documented evidence of any actual loss" and instead pointed only to "theoretical loss of wages" and minor changes in the working conditions. Moreover, the appellants claim that the Unions have actually benefitted from any changes because Springfield's railway business has increased and it has hired new union employees.

The appellants demand more loss than the law requires. The mere "prospect of having work shifted to a replacement subsidiary would constitute a change in the working conditions and practices" sufficient to trigger a major dispute. *Air Line Pilots Ass'n Int'l v. Transamerica,* 817 F.2d 510, 516 (9th Cir. 1987). In fact, even the loss of completely "new business," never performed by the unions, may be considered a change in the working conditions if the unions traditionally performed work of this type. *See Burlington*, 862 F.2d at 1276. Here, the Unions have shown far more than the prospective loss of new switching business. The exact switching work previously performed by Union workers is now being performed by non-union ABR employees. Moreover, because the Unions no longer perform

this switching, some members have had to report to different locations at different times than they otherwise would have, *a manifest change in "working conditions."*[9]

B. Implicit Term

The appellants claim that the district court erred in rejecting its argument that the collective bargaining agreement "implicitly" allowed the arrangement between Springfield and ABR. If a carrier presents evidence that the challenged labor practice has been knowingly acquiesced in by the union, the challenged practice is treated as an implicit term of the collective bargaining agreement and any dispute over the meaning of that term is minor. *See Maine Central R.R. Co. v. United Transp. Union*, 787 F. 2d 780, 782 (1st Cir. 1986). To take advantage of the minor dispute provision, the carrier need only show that the implicit contractual term defense is not "totally implausible." *Id.* at 783.

The appellants argue that the Unions had previously acquiesced to Springfield allowing several of its freight customers to perform their own switching. The dissent too makes much of this point, noting that even before ABR started switching for Lincoln and Champion, Springfield had assisted

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[9] The appellants also claim that any changes in pay, rules or working conditions were caused by ABR, and that Springfield cannot be held responsible for ABR's activities. As we stated above, the district court properly concluded that Springfield was using ABR to modify its collective bargaining agreement and defeat the status quo provisions of the RLA. Springfield, therefore, is responsible for changes in pay, rules and working conditions.

several mill customers (including ABR) in taking over their own switching. The district court, however, ruled that Union acquiescence in those instances was totally inapposite:

> The companies have pointed only to past practices where Springfield Terminal has helped its customers take over their own switching work. The unions, however, no longer quarrel with ABR doing its own switching. Instead, the unions complain because Springfield Terminal, they say, is essentially assisting ABR to act as a railroad in doing nonunion switching work for customers, specifically Terminal's customers, who would otherwise be using Springfield Terminal's union crews. There is not even arguably any such past practice. I agree with the unions that any purported reliance on past practices to justify this new arrangement is, therefore, obviously insubstantial; this is not a minor dispute.

The record amply supports the district court's past practice findings. The Unions have never accepted the idea that Springfield could use ABR as its non-union switching arm.[10]

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[10] Springfield also points out that on the one occasion it used non-union employees to perform switching work, one union ignored it and the other treated it as only a minor dispute. This argument does nothing to prove union acquiescence to an arrangement like that between Springfield and ABR. From the record, it appears that the case Springfield points to involved *which* employees (engineers or "carmen") were allowed to perform the

IV.

For all of the above reasons, the judgment below is **affirmed**.

Dissenting Opinion Follows

STAHL, Circuit Judge, dissenting. I believe the majority misreads the record and misapprehends the federal law on piercing the corporate veil. Consequently, I disagree with the majority's conclusion that the lower court properly pierced Springfield's corporate veil to enjoin ABR from doing switching work previously performed by Springfield. Accordingly, I dissent.

The majority's determination that ABR is subject to the RLA depends necessarily on its affirming the district court's holding that "the close family relationship" between ABR and Springfield, *Brotherhood of Locomotive Eng'rs v. Springfield Terminal Ry.*, Civil No. 98-284-P-H, slip op. at 9 (D. Me. Feb. 5, 1999), justifies the conclusion that Springfield unilaterally brought about a change in working conditions in violation of the collective bargaining agreement by "direct[ing]" the Lincoln and Champion switching work to ABR *See ante* at 26. The majority acknowledges, as do the Unions, that without finding ABR to be an alter ego--for

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switching on one specific track, not whether a party related to Springfield could essentially act as the carrier's non-union switching arm.

which there is no record evidence[1]–or a piercing of the corporate veil, it could not hold ABR liable under the RLA. In my view the district court's conclusion is not sustainable.

Before proceeding to discuss the issues before us, I must contend with how the majority couches its factual recitation. The majority states its intention to "begin by sketching the facts of this labor dispute, reserving for later a more detailed discussion of the district court's findings." *Ante* at 2. What follows, however, intermixes predicate facts in the evidence with the actual findings the district court made. To an uninformed reader, this intermixing of facts and the district court's findings might well be quite confusing. The effect is to bolster the majority's ultimate conclusion, which is not sustainable based solely on the district court's

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[1] The burden of proof is on the party seeking to disregard the corporate form. *See National Soffit & Escutcheons, Inc. v. Superior Sys., Inc.*, 98 F.3d 262, 265 (7th Cir. 1996); *Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069 (3d Cir. 1979) ("The burden of proof on this issue rests with the party attempting to negate the existence of a separate entity."). In this case, aside from drawing the trial court's attention to the overlap in ownership, the Unions failed to present evidence that the court should pierce the corporate veil. There is no evidence in the record, for example, as to whether the various individuals' ownership shares in Guilford and ABR are the same, similar, or very different.

findings, with bits and pieces of evidence from the record. I believe this approach is unfortunate.[2]

The majority suggests that ABR made each decision relating to switching solely to satisfy Springfield's goals. Neither the district court's findings nor the record supports such a contention. In early 1998, because its operations were growing, ABR decided it needed to provide additional trackage for the storing, loading, unloading, and switching of railroad cars over the two sidetracks that it owned and over which it had exclusive use. To satisfy its operational needs, it negotiated with its line-hauling carrier, Springfield, a

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[2] This case was before the district court on a stipulated record. When parties stipulate a record for decision, the district judge must "decide any significant issues of material fact that he discovers." *Boston Five Cents Sav. Bank v. Secretary of the Dep't of Hous. & Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985). Under such circumstances, we "receive[] the decision under a 'clearly erroneous' factfinding standard." *Id.* at 12. We take the findings of the district judge, and compare them with the record only to discover clear error. *See Strahan v Coxe*, 127 F.3d 155, 172 (1st Cir. 1997).

Because the majority agrees with the district court that piercing the corporate veil in the case of a close family relationship is appropriate, it is bound by the findings of the district court, which it may review only for clear error. However, this is not a case in which it is appropriate to scan the entire record to bolster the district court's ultimate conclusion. Based on the limited facts found by the district court, I believe that its ultimate conclusion that piercing the corporate veil was proper is in error.

standard joint use agreement, which is a contract by which a company obtains the use of a railroad's tracks for its own operations. Under this agreement, ABR to complement its own two tracks obtained the right to use four contiguous tracks owned and controlled by Springfield.

It is evident from the record that ABR received no special, treatment from Springfield because this agreement was identical to joint use agreements the railroad previously had negotiated with other customers. Long before ABR negotiated its agreement, Springfield had entered into similar joint use agreements with S.D. Warren of Westbrook, Maine in August 1992; Specialty Minerals, Inc. of Adams, Massachusetts in October 1996; and Turners Island LLC of South Portland, Maine in October 1997. In addition, Springfield had assisted several companies without joint use agreements--Merrill's Terminal of Portland, Maine in 1990; Hampshire Chemical of Nashua, New Hampshire in 1995; and Fort James of Old Town, Maine in 1996--in taking over their own switching. Like ABR, each company is a freight customer of Springfield's, each had ceased using Springfield for intraplant switching, and each had begun to perform its own switching. Moreover, in each of these instances, the shipper made the decision to do its own switching, and Springfield trained employees of each company in the operation of the trackmobile, a device used to move rail cars between tracks.

In April 1998, ABR, motivated by a desire to increase its flexibility and efficiency in switching, decided to do its

own intraplant switching.[3] The district court found that to accomplish its goals, ABR leased from Maine Central Railway a trackmobile, and two of ABR's employees received training in its operation from two Springfield employees. *See Brotherhood of Locomotive Eng'rs*, Civil No. 98-284-P-H, slip op. at 4. The record is clear that this assistance was neither unusual nor improper because it followed Springfield's normal practice when current line-haul customers elected to do their own switching. From Springfield's point of view, this assistance had a legitimate business purpose because the more efficient a customer became at switching, the more line-haul business that customer could give to Springfield.

Around the time that ABR decided to do its own switching, Lincoln and Champion complained that Springfield was unable to meet their scheduling needs for switching. Lincoln and Champion discussed with Springfield their intention to perform their own switching. The majority contends that Springfield "directed" or "transferred" switching work to ABR. *Ante* at 26 & n.8. Respectfully, I think this assertion misstates the record.[4] It was only after

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[3] When they filed their initial complaint, the Unions argued that the court should enjoin ABR from engaging in switching even at its own facility. The Unions later dropped this contention and focused solely on ABR's switching for Springfield's consignees. *See Brotherhood of Locomotive Eng'rs*, Civil No. 98-284-P-H, slip op. at 1 n.1.

[4] I believe it is accurate in some sense to say that Springfield facilitated ABR's obtaining outside switching work.

Lincoln and Champion had decided to leave Springfield[5] that

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Culliford assisted ABR in its efforts to get Lincoln's and Champion's business only after they made it clear to Springfield that they intended to perform the work on their own. The majority, however, uses the term "directed" in a pejorative manner and states that Springfield "transferred" its switching work to ABR. *See ante* at 26 n.8. Neither the findings of the district court nor the record supports this assertion.

[5] The district court indicated that Culliford "suggested that ABR pursue switching contracts with Springfield Terminal's customers. *Brotherhood of Locomotive Eng'rs*, Civil No. 98-284-P-H, slip op. at 9. But the district court never explicitly found that Lincoln or Champion would have used Springfield for their switching absent ABR's entry into the market.

To the extent the district court implicitly found that Lincoln and Champion would have remained customers of Springfield absent Culliford's suggestion, it committed clear error. *See Strahan*, 127 F.3d at 172. Because of the undisputed evidence in the record that Lincoln and Champion already had decided to discontinue Springfield's switching services, any finding or implication to the contrary by the district court or by the majority is not based on record evidence.

The majority notes that "the only evidence that Lincoln and Champion had chosen to end their switching agreement with Springfield before ABR was presented as an alternative comes from assertions by Springfield managers and officers" and that "[t]he district court did not credit this version of events in its opinion." *Ante* at 25-26. While it is true that only David Armstrong Fink and Culliford testified that Lincoln and Champion already had decided to cease the use of Springfield for switching, the Unions neither

Sydney Culliford, Vice President of Transportation for Springfield, suggested to David Armstrong Fink that if ABR were not using its trackmobile to full capacity, it could maximize its use by also performing switching services for other industries that wished to do their own switching. Because Lincoln and Champion already had decided that Springfield could not meet their switching needs when they began to use ABR, it is illogical to suggest that Springfield "directed" or "transferred" this business to ABR. After all, a company cannot transfer business it does not have.[6]

The Unions and the majority make much of Culliford's suggestion This suggestion, however, is unremarkable because it does not indicate that either Springfield or ABR were using the corporate form as a ruse. The record is devoid of evidence to indicate that Culliford acted at the instruction of any of the owners of Guilford or ABR when he made his suggestion to ABR management. Culliford is neither an owner nor a director of Guilford,

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attempted to discredit them in cross-examination nor presented evidence to the contrary. Indeed, the district court never expressed doubt about the veracity of this testimony. Therefore, the only conclusion the record supports is that Lincoln and Champion already had decided to leave Springfield.

[6] Taking the majority's logic to its ultimate conclusion, and given the breadth of the injunction now in force, if a shipper on the line were to call ABR and request that it do the company's switching, that too would be prohibited under the terms of the injunction simply because of the overlap in ownership.

Springfield, or ABR. More importantly, his suggestion made legitimate business sense for both companies because ABR could maximize its use of switching capabilities otherwise underutilized, and Springfield could ensure an expansion of its line-hauling business. A helpful suggestion from one company to another does not create an alter ego relationship or provide a basis for piercing the corporate veil.[7]

The majority's assertion that the railroad's attempt to renegotiate is further proof of collusion misses the mark. Rather, Springfield's continued attempts to renegotiate its union contract indicate that the railroad desired to save its switching business if it could, but recognized the need to decrease its costs to be competitive. A more realistic view than that advanced by the majority is that if Springfield and ABR truly were colluding, once Springfield "transferred" its switching work to what the majority says is its alter ego, ABR, it would have given up on trying to renegotiate the Union contract because its goals already would have been realized.

The majority also misconstrues the applicable legal standards. After explaining that federal law controls whether

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[7] The majority argues that because Springfield still engages in switching work, "it is difficult to fathom why Springfield would want to assist ABR if the latter were truly independent." *Ante* at 27. The majority sees collusion. Rather, and quite to the contrary, Springfield did nothing to harm its switching business by suggesting that ABR seek Lincoln's and Champion's business because Springfield, which was unable to meet their scheduling needs, already had lost them as customers.

to disregard the corporate form, the majority misreads and overstates that law. The majority contends that federal common law allows courts in cases involving federal statutes to fashion new, statute-specific rules for disregarding the corporate form. I do not agree.

While the majority is correct that in ERISA cases, we have crafted "a 'less rigorous' veil-piercing standard," *ante* at 13, we have not crafted one that is standardless. Contrary to the majority, which contends that veil piercing typically is appropriate to effectuate legislation,[8] this court always has engaged in a more searching inquiry. *See United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1092-93 (1st Cir. 1992. Common ownership alone is insufficient to justify piercing the veil. *See United*

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[8] The majority uses the purpose of the RLA, which is to prevent strikes, to conclude that it is appropriate to pierce the corporate veil to render the RLA applicable to nonrailroads. But the majority fails logically to connect these ideas. It cites *Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142 (1969), and implies that its strong statements about the importance of the RLA justify piercing the veil in all RLA cases. *Shore Line*, however, is inapposite because that decision has nothing to do with piercing the corporate veil. Rather, it involved a railroad and a union that already were in mediation under the major dispute rules of the Act. *See id.* at.145. During mediation, *the railroad itself* implemented a new policy that changed a previously uncovered condition in the collective bargaining agreement. *See id.* at 146-47. The Court's strong statements that allowing the railroad's actions would defeat the Act's purposes, *see id.* at 155, neither bear weight in deciding whether to pierce the corporate veil nor help to articulate what the federal standard is.

Paperworkers Int'l Union v. T. P. Property Corp., 583 F.2d 33, 35-36 (1st Cir. 1978); *ante* at 19. Moreover, the mere existence of a parent-subsidiary relationship is insufficient to justify piercing the veil.[9] *See American Bell Inc. v.*

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[9] The district court, and the majority, relied on *Burlington Northern Railroad v. United Transportation Union*, 862 F.2d 1266 (7th Cir. 1988), for the proposition that courts "can look beyond the surface of purportedly similar transactions to see whether the disputed practice before it is in reality an attempt to evade the collective bargaining agreement." *Brotherhood of Locomotive Eng'rs*, Civil No. 98-284-P-H, slip op. at 9. I read *Burlington* differently.

In that case, to implement a new program, Burlington, the railroad, negotiated with the unions to change their collective bargaining agreement, but the unions refused. *See Burlington,* 862 F.2d at 1269. In response, Burlington entered into a trackage rights agreement with Winona Bridge, its wholly owned subsidiary, which was not a party to the collective bargaining agreement, and the unions sued to enjoin them. *See id.* The issue was not whether the court should pierce Winona Bridge's corporate veil; rather, it was whether the unions had acquiesced in similar past activities. *See id.* at 1273. Such acquiescence can be used to show that a dispute is "minor" under the RLA. *See Maine Cent. R.R. v. United Transp. Union*, 787 F.2d 780, 782-83 (1st Cir. 1986). The court found that while the unions had acquiesced in Burlington's granting of trackage rights generally, they never had acquiesced in its granting them "to a wholly owned, five-employee subsidiary which utterly lack[ed] any of the necessary equipment to service such a line." *Burlington*, 862 F.2d at 1273. The court, in other words, merely narrowed the scope of the unions' previous acquiescence without engaging in any alter ego analysis.

Federation of Tel. Workers, 736 F.2d 879, 887 (3d Cir. 1984) ("As [the First Circuit] has explained, there is no policy of federal labor law, either legislative or judge-made, that a parent corporation is bound by its subsidiary's labor contracts simply because it controls the subsidiary's stock and participates in the subsidiary' s management." (*citing United Paperworkers*, 583 F.2d at 35-36)). Instead,

> [a] court using the federal standard should consider (1) whether the parent and the subsidiary ignored the independence of their separate operations, (2) whether some fraudulent intent existed on the principals' part, and (3) whether a substantial injustice would be visited on the proponents of the veil pierce should the court validate the corporate shield.

163 Pleasant, 960 F.2d at 1092-93. As the *163 Pleasant* court noted, "fraudulent intent is the sine qua non to the remedy's availability." *Id.* at 1093, *see also id.* at 1095 ("Veil piercing cannot occur without some degree of moral culpability on the parent corporation's part."); *American Bell*, 736 F.2d at 886-87 (finding piercing appropriate only when "the corporations simply acted interchangeably and in disregard of their corporate separateness" (internal quotation marks and citations omitted)). Of course, courts will raise questions when the purpose of incorporation was to avoid a legislative dictate,[10] *see* Note, *Piercing the Corporate Law*

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[10] For example, in *Chicago, Milwaukee & St. Paul Railway v Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490

Veil The Alter Ego Doctrine Under Federal Common Law, 95 Harv. L. Rev. 853, 869 (1982), but "[t]he true test must be whether the corporation was created for a legitimate business purpose or primarily for evasion of a federal policy or statute," *id.* at 868.

This case presents no evidence of fraudulent intent[11] nor any evidence of a lack of corporate independence. ABR was formed to operate a sawmill and a wood products plant. *See Brotherhood of Locomotive Eng 'rs*, Civil No 98-284-P-H, slip op. at 2. It is not a shill. It began its operations not after, or as a result of, the railroad's failed negotiations with the Unions, but in 1994, which was two years *before* the labor contract even began. It began switching to satisfy its own production needs. It shares with Springfield neither books, funds, nor offices. It shares with Springfield no corporate officers and with the exception of David Armstrong Fink,

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(1918), two railways had incorporated a subsidiary that owned some switching track solely to implement higher tariffs than they could collect if they owned the tracks themselves. *See id.* at 500. The Court noted that "courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved." *Id.* at 501.

[11] I do not disagree with the majority's statement that "manipulation of the corporate form to circumvent a federal regulatory scheme is sufficiently blameworthy" to constitute fraudulent intent. *Ante* at 25 n.7. My disagreement is with its conclusion that such manipulation has occurred in this case.

who is the president of ABR and a vice-president of Springfield, no common employees. Indeed, all it does share with Springfield is some ownership congruence, but the record is silent on the degree of that overlap because it fails to indicate what percentages of each company the Finks and Mellon own.[12]

The majority buttresses its decision to pierce the corporate veil with cases that are inapplicable to the facts before us.[13] To justify disregarding the corporate form in a

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[12] Even if one accepts the facts as the majority relates them, under its approach, the standards by which we pierce the corporate veil will vary from one statutory context to the next with little judicial guidance as to how those standards may differ, and companies covered by these statutes will have no ready basis upon which to understand what the law now is.

[13] The majority cites two Seventh Circuit cases for the proposition that courts often pierce the corporate veil outside the parent-subsidiary context. *See ante* at 18 (citing *C.M. Corp. v. Oberer Dev. Co.*, 631 F.2d 536 (7th Cir. 1980); *Central Nat'l Bank of Mattoon v. Bowen Transps., Inc. (In re Bowen Transps., Inc.)*, 551 F.2d 171 (7th Cir. 1977)). These cases, however, lend no assistance. In *In re Bowen*, the court stated that it did "not believe that the equitable doctrine of piercing the corporate veil is limited to the parent-subsidiary relationship." 551 F.2d at 179; *accord C.M. Corp.*, 631 F.2d at 539. The *In re Bowen* court then noted that "[t]he separate corporateness of *affiliated corporations* owned by the *same parent* may be equally disregarded under the proper circumstances." 551 F.2d at 179 (emphasis supplied); *accord C.M. Corp.*, 631 F.2d at 539. These cases refer not to the circumstance presented --that is, companies with mere ownership

case with mere ownership overlap, the majority relies entirely on cases that involve wholly owned subsidiaries. *See ante* at 17-19 (discussing *Burlington*, 862 F.2d 1266; *Butte, Anaconda & Pac. Ry. v. Brotherhood of Locomotive Firemen & Enginemen*, 268 F.2d 54 (9th Cir. 1959)). For example, in *Butte*, the railway was "a-wholly-owned subsidiary of Anaconda, and both corporations [were] managed by the same staff of officers from president down to secretary-treasurer." *Butte*, 268 F.2d at 55. ABR is not a subsidiary of Springfield or Guilford, and the companies are not managed by the same personnel. In *Butte*, the officers who made all major policy decisions for the subsidiary were also officers of the parent, and as one might expect, their "controlling consideration" always was "the ultimate effect" the decision would have on the parent's profits. No officers of ABR are officers of Springfield or Guilford. While the majority speculates that ABR's decisions were made for the sole benefit of Springfield, no record evidence supports that conclusion.

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congruence-- but to one in which a parent corporation owns many affiliated corporations. Moreover, both cases make it very clear that overlap in ownership alone is insufficient to pierce the corporate veil. *See C.M. Corp.*, 631 F.2d at 539 (noting that stock control and common officers and directors "are not sufficient by themselves to invoke the doctrine" because they "exist in most parent and subsidiary relationships" (internal citation and quotation marks omitted)); *In re Bowen*, 551 F. 2d at 179 ("[A]lthough stock control and common directors and officers are generally prerequisites for application of the doctrine permitting the corporate veil to be pierced, that is not by itself sufficient to bring the doctrine into operation.").

The majority attempts to extend the rule from these parent-subsidiary cases to this case, but does not satisfactorily justify or explain the extension. The majority uses the fact that *Burlington*, a Seventh Circuit case, employs the phrase "the same Corporate family" to justify piercing the veil in this case. *See ante* at 18. All of the cases *Burlington* cites after this language, however, involve wholly owned subsidiaries. *Burlington*, 862 F.2d at 1275 (citing *Burlington N. R.R. v. United Transp. Union*, 688 F. Supp. 1261, 1266-67 (N.D. Ill. 1988) (the district court opinion); *International Ass'n of Machinists & Aerospace Workers v. Eastern Airlines*, No. 87-1720, 1988 WL 25506 (D.D.C. Mar. 10, 1988), *vacated and remanded on other grounds*, 849 F.2d 1481 (D.C. Cir. 1988); *Butte*, 268 F.2d 54). Moreover, every time the term "corporate family" has appeared in a Seventh Circuit opinion, it has referred not to a mere overlap in ownership, but to corporations within a parent-subsidiary relationship. *See In re Meyer*, 120 F.3d 66, 69 (7th Cir 1997), *Fitzgerald v. Chrysler Corp.*, 116 F 3d 225, 228 (7th Cir. 1997); *Northern Ind. Pub. Serv. Co. v. C.I.R.*, 115 F.3d 506, 514 (7th Cir. 1997); *In re Vicars Ins. Agency, Inc.*, 96 F.3d 949, 950 & n.1 (7th Cir. 1996); *Addis v. Holy Cross Health Sys. Corp.*, 88 F.3d 482, 484 (7th Cir. 1996); *Kusak v. American Info. Sys., Inc.*, 80 F.3d 199, 201 (7th Cir. 1996); *Central States, Southeast & Southwest Areas Pension Fund v. Sherwin-Williams Co.*, 71 F.3d 1338, 1342 (7th Cir. 1995); *Baeco Plastics, Inc. v. Inacomp Fin. Servs., Inc.*, No. 94-3391 , 1995 WL 140720 (7th Cir. Mar. 29, 1995); *First City Sec., Inc. v. Shaltiel*, 44 F.3d 529, 531 (7th Cir. 1995); *Sears, Roebuck & Co. v. C.I.R.*, 972 F.2d 858, 860-61 (7th Cir. 1992); Fought v. Evans Prods. Co. Racine Pension Plan *Agreement*, 966 F.2d 304, 305 (7th Cir. 1992); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 786 F.2d 794,

802 (7th Cir. 1986); (Easterbrook, J., concurring); *Independence Tube Corp v. Copperweld Corp.*, 691 F.2d 310, 317 n.5 (7th Cir. 1982), *rev'd*, 467 U.S. 752 (1984); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 726 (7th Cir. 1979); *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 324 (7th Cir. 1963). The same holds true for First Circuit cases. *See CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co.*, 144 F.3d 35, 37 (1st Cir. 1998); *Donatelli v. National Hockey League*, 893 F.2d 459, 466 (1st Cir. 1990); *Barrett v. Continental Ill. Nat'l Bank & Trust Co.*, 882 F.2d 1, 3 n.2 (1st Cir. 1989); *Pujol v. Shearson Am. Express, Inc.*, 877 F.2d 132, 136 (1st Cir. 1989); *San Francisco Real Estate Investors v. Real Estate Inv. Trust of America*, 701 F.2d 1000, 1001 (1st Cir. 1983); *Ladd v. Brickley*, 158 F.2d 212, 220 (1st Cir. 1946). The majority thus has little basis upon which to hold that *Burlington's* use of the phrase "corporate family" was meant to refer to anything other than the wholly owned subsidiary at issue in that case. While arguably there may be cases in which stockholders of a railroad form a nonsubsidiary for the sole purpose of circumventing the collective bargaining agreement, there is no record support for the contention that this is such a case, nor should the parent-subsidiary argument be used to extend the doctrine here.

The majority cites *Minnesota Power v. Armco, Inc.*, 937 F.2d 1363 (8th Cir. 1991), for the proposition that courts have pierced the corporate veil in cases involving complex partnership schemes. *See ante* at 18-19. *Minnesota Power*, however, does not support the majority's contention even though it did involve a complex partnership scheme. From 1978 through 1982, the Reserve Mining Co. ("Reserve") was the wholly owned subsidiary of Armco and Republic Steel.

See Minnesota Power, 937 F.2d at 1364. In 1982, Armco and Republic Steel changed Reserve into a partnership and each took an equal share. *See id.* Armco then transferred to its wholly owned corporate subsidiary, First Taconite, its partnership interest. The Eighth Circuit saw no clear error in the district court's findings that (1) from 1978 through 1982, Reserve, which was Armco's and Republic Steel's wholly owned *corporate* subsidiary, was Armco's alter ego and (2) from 1982 through 1986, First Taconite, which as Armco's wholly owned corporate subsidiary owned a *partnership* interest in Reserve, was Armco's alter ego. *See id.* at 1364, 1368. That court merely held wholly owned corporate subsidiaries to be the alter ego of their parent.

The majority also cites *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316 (5th Cir. 1984), quoting language that "we see no relevant difference between a corporation wholly owned by another corporation . . . or two corporations wholly owned by three persons who together manage all affairs of the two corporations." *Id.* at 1317. This case dealt not with the RLA, but with whether two corporations with the same ownership and control constituted a single entity under Section 1 of the Sherman Act. *See id.* at 1316. In *Century Oil*, the same three men owned and controlled both Gas Lift, which manufactured "wireline tools and gas lift valves," and Production Specialties, which sold them. *Id.* at 1317. Each company existed solely to benefit the other. In addition, "[b]oth corporations operated from the same physical plant." The Unions concede that ABR's principal business is unrelated to the railroad's and that switching is incidental to its main business. And, while the majority thinks it immaterial that ownership and control between Springfield and ABR is not identical, the *Century Oil*

court would disagree. *See id.* at 1317 n.1 ("We address only the question of the independence of two corporations under common ownership. The point at which the ownership of two or more corporations so loses its commonality as to furnish a plurality of actors is not before us."). I remain unpersuaded by the majority's expansion of responsibility to companies with only some ownership congruence.

Finally, the import of the court's decision today has much significance for ABR. The RLA sets up separate procedures depending on whether a dispute is major or minor. If the dispute is minor, it will be resolved quickly through "compulsory and binding arbitration." *Consolidated Rail Corp. v. Railway Labor Executives 'Ass'n*, 491 U.S. 299, 303 (1989). In contrast, major disputes endure "a lengthy process of bargaining and mediation" during which "the parties are obligated to maintain the status quo." *Id.* at 302. Congress designed the major-dispute procedures to prevent strikes. *See Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 725-26 (1945). The majority's resolution of the major-minor issue will have little or no impact on the Unions because no Union jobs have been lost as a result of shippers doing their own switching; rather, Springfield in fact has provided more Union jobs since losing some of its switching business. The majority's conclusion, however, does not allow ABR, a nonrailroad and a legitimate business, the right to expand its switching operations to other entities that also desire timely and flexible switching, nor does it regain for Springfield the switching business it already has lost.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Filed March 2, 1999]

No. 98-284-P-H

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and UNITED TRANSPORTATION UNION,
Plaintiffs

v.

SPRINGFIELD TERMINAL RAILWAY COMPANY and AROOSTOOK AND BANGOR RESOURCES, INC.,
Defendants

PERMANENT INJUNCTION

This matter came on to be heard for judgment on a stipulated record. The Court having considered the stipulated record and the memoranda of counsel for the parties; having heard oral argument by both sides; and the Court having previously made and filed its findings of fact and conclusions of law in its Judgment and Order filed on February 5, 1999; having concluded that the parties are involved in a "major" dispute under the Railway Labor Act, 45 U.S.C. §151 et seq.,

and are to maintain the status quo pending mediation of their dispute pursuant to Section 6 of the Railway Labor Act, 45 U.S.C. §156; and that Plaintiffs are entitled to judgment for the relief prayed for in the Complaint, to the extent that it is hereafter granted.

Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Defendants, their officers, directors, agents, servants, employees, attorneys, and all those persons or entities in active concert or participation with them, who receive actual notice of this injunction by personal service or otherwise, are hereby permanently enjoined from transferring the work of industrial switching from defendant Springfield Terminal Railway Company to Defendant Aroostook and Bangor Resources, Inc., without applying the collective bargaining agreements between Defendant Springfield Terminal Railway Company and Plaintiffs, Brotherhood of Locomotive Engineers and United Transportation Union, to the work of industrial switching accomplished by Defendant Aroostook and Bangor Resources, Inc., unless and until those agreements are changed by the parties to permit such transfer, or the negotiation and mediation process described in the Railway Labor Act, which begins with the filing of the notice of intended changes that is required by Section 6 of the Railway Labor Act, 45 U.S.C. §156, has been exhausted, except as to the performance of industrial switching by Defendant Aroostook and Bangor Resources, Inc. for itself at its facility in Mattawamkeag, including the Springfield Terminal-Aroostook and Bangor track lease adjacent and

connected thereto, which is not subject to the status quo requirements of the Railway Labor Act; and

2. That Defendant Aroostook and Bangor Resources, Inc. its officers, directors, agents, servants, employees, attorneys, and all those persons or entities in active concert or participation with them, who receive actual notice of this injunction by personal service or otherwise, are hereby permanently enjoined, from performing industrial switching for Lincoln Pulp & Paper, for Champion International, Inc., or for any other entity to whom Defendant Springfield Terminal Railway Company currently provides switching services, other than as to industrial switching for itself at its facility in Mattawamkeag, including the Springfield Terminal-Aroostook and Bangor track lease adjacent and connected thereto, which remains in effect.

Dated: March 2, 1999

/s/_____
D. Brock Hornby
United States Chief District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

[Filed March 5, 1999]

No. 98-284-P-H

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and UNITED TRANSPORTATION UNION,
Plaintiffs

v.

SPRINGFIELD TERMINAL RAILWAY COMPANY and AROOSTOOK AND BANGOR RESOURCES, INC.,
Defendants

JUDGMENT AND ORDER

This lawsuit arises out of the defendant Aroostook & Bangor Resources' ("ABR") use of nonunion employees to switch railroad cars on the premises of shippers who used to be served by the unionized employees of Springfield Terminal Railway Company ("Springfield Terminal"). The unions claim that the practice amounts to a unilateral change of the working conditions established under the collective bargaining agreements between Springfield Terminal and the unions.

The unions seek an injunction to maintain the status quo pending mediation of this dispute under section 6 of the Railway Labor Act. *See* 45 U.S.C. § 156.[1] The matter is presented for judgment on a stipulated record.[2] Because I conclude that the parties are involved in a so-called "major"

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[1] Although the unions initiated this lawsuit by complaining of many different actions on the part of both Springfield Terminal and ABR, they narrowed the scope of their dispute significantly in subsequent pleadings and at oral argument. At oral argument, the unions conceded that ABR is free to do its own switching at its facility at Mattawamkeag, and focused their complaint on a single issue: their request to enjoin ABR from doing switching for Springfield Terminal consignees.

[2] Although the plaintiffs styled their final pleading a motion for summary judgment, the record is clear that the parties are not cross-moving for summary judgment but are seeking judgment on a stipulated record. The procedural difference is significant. In a case submitted for judgment on a stipulated record, I resolve disputed issues of material fact; on cross-motions for summary judgment, if I find genuinely disputed issues of material fact, I can neither resolve the disputes nor enter a final judgment. *See Boston Five Cents Sav. Bank v. Secretary of the Dep't of Housing & Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985).

Although the parties submitted a stipulated record, the plaintiffs moved at oral argument to open the record. Specifically, they wished to add two items (a calendar and a newsletter) recently published by the "Guilford Rail System." Exhs. 1 and 2. I reserved ruling at the hearing. I now accept these items into evidence, but, as I find them duplicative of evidence already in the record, I give these items no weight in reaching my decision.

dispute under the Railway Labor Act, the request for a status quo injunction is GRANTED. Pursuant to Fed. R. Civ. P. 52(a), I enter my findings of fact and conclusions of law.

FINDINGS OF FACT

Springfield Terminal is a wholly owned subsidiary of Guilford Transportation Industries, Inc. ("Guilford"). Springfield Terminal engages in general railroad operations: it owns, leases and operates tracks, maintains rail yards and provides freight service to rail customers. Guilford, so far as appears from the record, is a holding company.

ABR was formed in August of 1994 in order to purchase an existing mill facility at Mattawamkeag, Maine. ABR was capitalized by its three shareholders, Timothy Mellon, David Andrew Fink and his son, David Armstrong Fink. ABR has thirty-five employees and engages primarily in processing and manufacturing raw and finished wood products.

The three corporations, Guilford, Springfield Terminal and ABR, are all closely related. From January 1998 to August 1998, the three corporations had the same four directors: specifically, the three owners of ABR, plus Richard Kelso.[3] These four individuals also own all the shares of

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[3] Before January 1998, D. Armstrong Fink was not a member of the board of Springfield Terminal. He joined the board in January 1998, the same time that he became employed by Springfield Terminal as Executive Vice President. His duties at Springfield Terminal include media relations and government affairs; he is responsible for running the daily staff meeting when

Guilford. The only difference in ownership between ABR and Guilford, therefore, is that Mr. Kelso owns some portion - the record does not indicate how big a portion - of Guilford but owns no portion of ABR.

No commonality of corporate officers appears in the record. The only overlap of management (beyond the identity of directors) is that D. Armstrong Fink is President of ABR and is an Executive Vice President at Springfield Terminal. There is no evidence in the record to show who the officers of Guilford are.

Both unions are national in scope and represent different crafts in their dealings with Springfield Terminal. The Brotherhood of Locomotive Engineers represents the crafts of locomotive engineers and hostlers, and the United Transportation Union represents brakemen, conductors, laborers and police. Both unions have collective bargaining agreements with Springfield Terminal governing wages and

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the President is not available.

After August 1998, the Springfield Terminal board added a fifth director. Thomas Steiniger became the fifth director, when he joined Springfield Terminal as its President, replacing D. Andrew Fink. Mr. Fink retained his position as a director.

I have focused on the makeup of the companies for the period January 1998--August 1998 because that is when the operational changes at ABR, which are at the heart of this dispute, began. The differences in corporate structures prior to January 1998 and after August 1998 are slight in any event.

crew makeup for the movement of railroad cars on Springfield Terminal track. There is no such agreement with ABR.

Between April 1996 and August 1996, Springfield Terminal attempted to negotiate a "mill switcher" agreement with the unions. The agreement would create two new positions: "mill switcher," responsible for switching cars on the premises of Springfield Terminal's customers; and "mill switcher engineer," a locomotive engineer engaged in switching work for a customer. Mill switcher crews would be smaller than the crews required under the existing collective bargaining agreements, and wages for engineers when performing mill switching would be lower than the engineer's wages set m the collective bargaining agreements. Proposed agreements negotiated by the unions' leadership were rejected by the membership of both unions.

Approximately two years later, in April 1998, Springfield Terminal employees went to the ABR yard at Mattawamkeag and trained ABR employees to do switching at ABR's mill. The training lasted about six days. ABR leased a trackmobile from Maine Central (another railroad owned by Guilford), with a view to doing its own switching at Mattawamkeag. Springfield Terminal leased four tracks to ABR at Mattawamkeag (in addition to the two tracks that ABR uses inside its own fence) to facilitate ABR's self-switching.

Sydney Culliford, Springfield Terminal's Vice President of Transportation, suggested to ABR that, if ABR did not use the trackmobile to full capacity doing its own switching, ABR might do switching for third parties. Mr.

Culliford attended a meeting between ABR and Lincoln Pulp & Paper ("Lincoln") to discuss such a possibility.

By May 1998, ABR was doing its own switching and performing industrial switching for Lincoln and for Champion International, Inc. Both Lincoln and Champion are freight customers of Springfield Terminal. Springfield Terminal performed their industrial switching with union employees before ABR took over that work

In August 1998, the unions filed this federal lawsuit seeking an injunction pending mediation. In September 1998, they made a joint counter-proposal for a mill switcher agreement with Springfield Terminal.

CONCLUSIONS OF LAW

The parties agree that this court has jurisdiction to issue an injunction if their dispute is a "major" dispute, but not if it is "minor."[4]

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[4] This is not one of the exceptional cases in which an injunction can issue even though the dispute be minor. *See, e.g., International Ass'n of Machinists v. Eastern Air Lines*, 826 F.2d 1141, 1146 (1st Cir. 1987) (stating that the court should not issue an injunction in a minor dispute unless only that remedy can guard a plaintiff's Railway Labor Act right jeopardized by the defendant's statutory violation); *Railway Labor Executives' Ass'n v. Boston & Me. Corp.*, 808 F.2d 150, 157 (1st Cir. 1986) (holding that district court had jurisdiction over unions' claims that employer discharged employees in retaliation for employees' engaging in protected strike even though employer arguably had the contractual

"[U]nilateral attempts to change the contract" are major disputes, but "mere[] disagreements over the meaning or coverage of the contract" are minor disputes. *Brotherhood of Locomotive Eng'rs v. Boston & Me. Corp.*, 788 F.2d 794, 797 (1st Cir. 1986). "Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." *Consolidated R. Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 307 (1989) ("Conrail").

The contract claim can be based on either the express terms of the collective bargaining agreement or on implied terms, which comprise the actual objective working conditions in existence at any time. *See Brotherhood of Locomotive Eng'rs*, 788 F.2d at 799. Past practices sufficiently similar to the disputed practice can give rise to implied contract terms if the unions knowingly acquiesced in those practices; in characterizing the dispute as major or minor, the central question is whether the carrier's reliance on the alleged past practice is "totally implausible." *Maine Cent. R.R. v. United Transp. Union*, 787 F.2d 780, 783 (1st Cir. 1986).

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right to discharge any employee). There is a third class of dispute, the "representational" dispute, which is neither major nor minor; in a representational dispute, a federal court cannot issue a status quo injunction. *See United Transp. Union v. Gateway W. Ry.*, 78 F.3d 1208, 1213 (7th Cir. 1996) (describing a representational dispute). The parties have not briefed the issue of a representational dispute at all, and I see no basis in the record to conclude that this dispute is representational.

Here, the companies disavow reliance on any express contract term, *see* Post-Evidentiary Br. of Defs. (Docket Item 26) at 8; accordingly, this dispute is minor only if past practices arguably justify the action that the companies have taken. The companies have pointed only to past practices where Springfield Terminal has helped its customers take over their own switching work. The unions, however, no longer quarrel with ABR doing its own switching. Instead, the unions complain because Springfield Terminal, they say, is essentially assisting ABR to act as a railroad in doing nonunion switching work for customers, specifically Springfield Terminal's customers, who would otherwise be using Springfield Terminal's union crews. There is not even arguably any such past practice. I agree with the unions that any purported reliance on past practices to justify this new arrangement is, therefore, obviously insubstantial; this is not a minor dispute.

In the decided cases, the dispute that most resembles this one was held to be a major dispute. *See Burlington N. R.R. v. United Transp. Union*, 862 F.2d 1266 (7th Cir. 1988). In *Burlington*, the railroad negotiated with local committees of the United Transportation Union to reduce the crew makeup for a particular type of train, known as the "Expediter Service." Although most of the local committees came to agreement with the railroad, Burlington Northern could not obtain agreement from the local committees covering approximately 1,860 miles of track known as the railroad's "Northern line." The railroad, therefore, granted trackage rights over the Northern line to its wholly-owned subsidiary, Winona Bridge. The subsidiary, which had owned only an out-of-service bridge and a mile of track and which had only five employees, planned to hire all new crews

to operate the Expediter Service over the Northern line. The railroad obtained ICC approval for the trackage rights agreement. *See id.* at 1269. When the union protested the new arrangement, the district court found a major dispute and granted a status quo injunction, enjoining the performance of even the trackage rights agreement. The Seventh Circuit affirmed the finding of a major dispute, remanding only for the district court to tailor its injunction more narrowly so as to permit the trackage rights agreement—but not unilateral changes in the terms of the collective bargaining agreement—to remain in force. *See id.* at 1282. Burlington Northern claimed that the dispute was minor because the unions had acquiesced in up to forty prior trackage rights agreements, content to accept any ICC-imposed labor-protective provisions. *See id.* at 1273. The Seventh Circuit rejected that argument, looking behind the purported trackage rights agreement and construing the transaction as essentially a unilateral attempt to alter the terms of the collective bargaining agreement governing crew makeup. *See id.* at 1274.

The defendants attempt to distinguish the Springfield Terminal/ABR arrangement from *Burlington* on the ground that ABR is not a wholly owned subsidiary of Springfield Terminal, nor a wholly owned subsidiary of Guilford. The *Burlington* decision, however, does not rest on the fact that Winona Bridge was a wholly owned subsidiary. The relationship between Burlington Northern and Winona Bridge was relevant in *Burlington* as it bore on "whether Burlington ha[d] put forth a credible argument that the dispute in issue may be resolved by application of the collective bargaining agreement. . . . Burlington's argument that it has an implied contractual right to alter unilaterally crew consists is simply

too insubstantial to sustain." *Id.* at 1273. Likewise here, the argument that implied contractual rights permit the new arrangement is simply too insubstantial.

Moreover, *Burlington* stands for the proposition that a court can look beyond the surface of purportedly similar transactions to see whether the disputed practice before it is - in reality an attempt to evade the collective bargaining agreement; where the disputed transaction allows a corporate relative not bound by the collective bargaining agreement to perform work covered by the collective bargaining agreement, and that transaction follows closely on the railroad's failed attempt to negotiate new terms for the work in question, such facts - though not conclusive - bear directly on the plausibility of the railroad's claim that the collective bargaining agreement arguably permits the transaction in question. *See id.* at 1273.

In this case, after failing to obtain a mill switcher agreement with the unions, Springfield Terminal trained ABR personnel to do industrial switching; Springfield Terminal's Vice President of Transportation suggested that ABR pursue switching contracts with Springfield Terminal's customers and attended at least one meeting between ABR and a Springfield Terminal customer for that purpose; and another Guilford-owned railroad leased ABR the trackmobile that it uses to do switching. Given the close family relationship among these various corporations and Springfield Terminal's failed attempt to negotiate more favorable terms for the work that ABR is now doing on a nonunion basis, Springfield Terminal's claim that it is not attempting to change unilaterally the terms of the collective bargaining agreements is totally implausible.

Accordingly, the dispute between these parties is major, not minor. The parties are to maintain the status quo pending Section 6 mediation of their dispute. The defendant Aroostook & Bangor Resources, Inc. can continue to perform its own industrial switching at its facility in Mattawamkeag, and the Springfield Terminal-ABR track lease can remain in effect. The defendant Aroostook & Bangor Resources, Inc. will be enjoined, however, from performing industrial switching for Lincoln Pulp & Paper, for Champion International, Inc. or for any other entity to whom Springfield Terminal currently provides switching services.

The unions shall prepare the text of an injunction and present it for approval of form to the defendants, then file it with the Court by February 19, 1999.

SO ORDERED.

DATED THIS 5TH DAY OF FEBRUARY, 1999.

/s/_____
D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Entered July 10, 2000]

No. No. 99-1328

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED TRANSPORTATION UNION, *Plaintiffs, Appellees,*	)
v.	)
SPRINGFIELD TERMINAL RAILWAY COMPANY, AROOSTOOK AND BANGOR RESOURCES, INC., *Defendants, Appellants.*	)

BEFORE

TORRUELLA, Chief Judge,
CYR, Senior Circuit Judge,
SELYA,*, STAHL, LYNCH and LIPEZ Circuit Judges.

* Judge Boudin recused from this case.

ORDER OF COURT

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular, active service not recused, and an insufficient number of votes having been cast in favor of the appeal being heard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Phoebe D. Morse, Clerk

By:/s/ Janice M. O'Neil
Chief Deputy Clerk

[cc: Messrs. Zmistowski, Miller and Ross]

APPENDIX E

45 U.S.C. S §§ 151, 152, 153 and 156

§ 151. Definitions; short title

When used in this Act and for the purposes of this Act—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": Provided, however, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not

include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this Act.

Third. The term "Mediation Board" means the National Mediation Board created by this Act.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts

according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the Supreme Court of the District of Columbia [United States District Court for the District of Columbia]; and the term "circuit court of appeals [court of appeals]" includes the Court of Appeals of the District of Columbia [United States Court of Appeals for the District of Columbia].

This Act may be cited as the "Railway Labor Act."
(May 20, 1926, ch 347, Title I, § 1, 44 Stat. 577; June 21, 1934, ch 691, § 1, 48 Stat. 1185; April 10, 1936, ch 166, 49 Stat. 1189; Aug. 13, 1940, ch 664, §§0 2, 3, 54 Stat. 785.)

* * *

45 USCS § 152 **Railroads**

Sixth. Conference of representatives time; place; private agreements. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreement or in section 6 of this Act [45 USCS §156].

Eighth. Notices of manner of settlement of disputes; posting. Every carrier shall notify its employees by printed

notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or. . .

* * **

45 USCS § 153

. . . service; Provided, however, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: Provided further, however, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [enacted June 21, 1934], shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make. . .

* * *

45 USCS § 156 Procedure in changing rates of pay, rules, or working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act [45 USCS § 155], by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.
(May 20, 1926, ch 347, Title I, § 6, 44 Stat. 582; June 21, 1934, ch 691, § 6, 48 Stat. 1197; April 10, 1936, ch 166, 49 Stat. 1189.)